

## Timberail Sdn Bhd v The owner and/or other persons interested in the vessel 'San Yang 2'

HIGH COURT (MIRI) — ADMIRALTY IN REM NO 27-03 OF 1997  
ELIZABETH CHAPMAN JC  
17 JUNE 1998

*Shipping and Navigation — Action in rem — Arrest of vessel — Order for sale of vessel — Whether vessel ought to be appraised and sold pendente lite*

The plaintiff filed a notice of motion for an order that the vessel 'San Yang 2' ('the vessel') — which is currently under arrest — be appraised and sold pendente lite. Since the vessel's arrest on 30 July 1997, it had been rusting away at the plaintiff's wharf. To date, no alternative security has been given or offered for the vessel's release. The vessel is also charged to a financial institution and it was unascertainable whether the chargee intends to enforce the security.

**Held**, allowing the application:

As the vessel was rusting away at the plaintiff's wharf, a continuation of the arrest of the ship could only reduce its value as security. Furthermore, there was no evidence of the defendant's financial strength. In the light of these circumstances, it was in the interest of all the parties concerned to allow the application (see p 436F-G).

### [Bahasa Malaysia summary]

Plaintif memfailkan suatu notis usul untuk satu perintah bahawa kapal 'San Yang 2' ('kapal tersebut') — yang di bawah tangkapan buat masa ini — untuk dinilai dan dijual pendente lite. Sejak tangkapan kapal tersebut pada 30 Julai 1997, ia dibiarkan berkarat di dermaga plaintif. Sehingga kini, tiada cagaran alternatif telah diberikan atau ditawarkan untuk pelepasan kapal tersebut. Kapal tersebut juga dicagarkan kepada sebuah institusi kewangan dan tiada dapat ditentukan sama ada pemegang gadaian berniat menguatkuasakan cagaran.

**Diputuskan**, membenarkan permohonan:

Oleh kerana kapal tersebut dibiarkan berkarat di dermaga plaintif, tangkapan berterusan kapal tersebut hanya akan merendahkan nilai sebagai cagaran. Tambahan pula, tiada apa-apa keterangan atas kekukuhan kewangan defendan. Memandangkan keadaan begini, adalah dalam kepentingan semua pihak berkenaan untuk membenarkan permohonan (lihat ms 436F-G).]

**A Notes**

For cases on order for sale of vessel, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 903–904.

**B Cases referred to**

*Gulf Venture, The* [1985] 1 Lloyd's LR 131 (refd)

*Myrto, The* [1977] 2 Lloyd's LR 243 (refd)

*Gabriel Kok (Khoo & Co)* for the plaintiff.

*Kavin Chong (Victor Wong & Chiew)* for the defendant.

- C Elizabeth Chapman JC:** This is a notice of motion by the plaintiff for an order that the vessel 'San Yang 2' be appraised and sold 'pendente lite'. The vessel is currently under arrest in Miri and a claim by the plaintiff against the defendant as can be seen from the writ of summons and statement of claim is for the sum of RM221,622.79, general damages and interest and costs. The particulars are as stated in the statement of claim.
- D** The defendant in this case has not posted any bond or security for the release of the said vessel.

DC Jackson in his book *Enforcement of Maritime Claims* (Lloyd's of London Press Ltd, 1985) wrote on pp 6–7:

- E** In any action, a court has power to order the sale of property (the subject of a claim) which is perishable, likely to deteriorate or in relation to which there is good reason for sale. Such a sale of itself would be subject to such encumbrances as exist prior to the sale ...

- F** A sale pending suit is normally ordered on the grounds that retention of the property will cause the plaintiff's security to diminish if for no other reason than the mounting costs of arrest. It is unusual that such an order is made in a defended case where alternative security will be provided, but it may be made where it would be unreasonable to keep property (particularly a ship) under arrest for a long period.

- G** The affidavit evidence filed herein discloses that the plaintiff is renting a wharf from Messrs San Hak Plywood Sdn Bhd and the plaintiff has to manoeuvre some of their own operations in order to accommodate the defendant's barge, and at times to use alternative wharfs. They have also provided additional security for the defendant's vessel. Since the vessel's arrest on 30 July 1997, the vessel has been at Sungei Krokop and is rusting away due to exposure to the elements of nature and the weather and the corrosive nature of the waters at Sungei Krokop. To date, no alternative security has been given or offered for the vessel's release.
- H**

In *The Myrto* [1977] 2 Lloyd's LR 243, it was stated by Brandon J at p 260:

- I** Where defendants to an action in rem against a ship appear in the action with the intention of defending it, they almost invariably obtain the release of the ship from arrest by giving bail or providing other security for the claim satisfactory to the plaintiffs.

The learned judge went on to say:

I accept that the court should not make an order for the appraisal and sale of a ship *pendente lite* except for good reason, and this whether the action is defended or not, I accept further that, where the action is defended and the defendants oppose the making of such an order, the court should examine more critically than it would normally do in a default action the question whether good reason for the making of an order exists or not, I do not accept, however, the contention put forward for the owners; the circumstances that, unless a sale is ordered, heavy and continuing costs of maintaining the arrest will be incurred over a long period, with consequent substantial diminution in the value of the plaintiffs' security for their claim, cannot, as a matter of law, constitute a good reason for ordering a sale. On the contrary, I am of opinion that it can and often will do so.

This view seems to me to accord with the terms of RSC, O 29 r 4, which authorizes an interim sale of property not only because it is of a perishable nature, or likely to deteriorate if kept, but for 'any other good reason'.

In this instant case, the vessel is also charged to a financial institution. The defendant has refused to give their consent to the chargees of the vessel to disclose the amount outstanding or due and to date the plaintiff is unable to ascertain whether the chargee intends to enforce security. It is relevant at this juncture to quote what Sheen J said in *The Gulf Venture* [1985] 1 Lloyd's LR 131 at pp 135-136:

But if the mortgagees are not entitled to enforce one or more of the mortgages, delay in the sale of the ship can only have the effect of increasing those costs which take priority over the mortgages, thereby reducing the security for the mortgage debt.

The vessel is currently rusting away at the plaintiff's wharf and a continuation of the arrest of the ship can only reduce its value as security. Further, there is no evidence of the defendant's financial strength: see *The Gulf Venture*.

Such deterioration would lead to a diminution in the value of the vessel and the market price would be affected. The costs incurred would continue to be incurred for the arrest of the vessel. In the light of the circumstances mentioned above, I find that it is in the interest of all the parties concerned to make an order in terms as prayed in the motion.

*Application allowed.*

Reported by Loo Lai Mee